

No. 86-341

Supreme Court, U.S.
FILED

DEC 29 1986

STEPHEN F. SPANGLER, JR.
CLERK

IN THE
Supreme Court of the United States
October Term 1986

FORT HALIFAX PACKING COMPANY, INC.,

Appellant,

—against—

P. DANIEL COYNE, Director, Bureau of Labor Standards,
Department of Labor,

Appellee.

ON APPEAL FROM THE MAINE SUPREME JUDICIAL COURT

**BRIEF OF AMICUS CURIAE CHAMBER OF
COMMERCE OF THE UNITED STATES OF
AMERICA IN SUPPORT OF APPELLANT**

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Questions Presented

1. Whether the Maine Severance Pay Law, which requires certain employers either to enter into an express contract providing for severance pay with certain employees or, in the absence of such an agreement, to pay the state mandated amount of severance pay, is preempted by the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.*

2. Whether the Maine Severance Pay Law is preempted by the National Labor Relations Act, 29 U.S.C. § 141 *et seq.*

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Statement of Interest

The Chamber of Commerce of the United States of America (the Chamber) is a federation consisting of approximately 180,000 companies and several thousand state and local chambers of commerce and trade and professional associations. It is the largest association of business and professional organizations in the United States. A significant aspect of the Chamber's activities is the representation of the interests of its member-employers in employment and labor relations matters before the courts, Congress and federal agencies. Accordingly, the Chamber has sought to advance those interests by filing *amicus curiae* briefs in a wide spectrum of labor relations litigation.¹ The Chamber submits this brief in support of Appellant Fort Halifax Packing Company, Inc.²

This case involves the State of Maine's requirement that employers with 100 or more employees in one location during a specified twelve-month period enter into express contracts with certain of their employees to pay severance pay to such employees or pay the state-mandated amount of severance pay upon a substantial cessation of the employer's business. The issues are whether Maine's law mandating severance pay (the Maine Severance Pay Law or Severance Pay Law) is preempted by the Employee Retirement Income Security Act of 1974 (ERISA) regulating employee benefit plans and whether the Maine Severance Pay Law impermissibly interferes with the

¹E.g., *Wisconsin Department of Labor and Industry v. Gould*, 106 S.Ct. 1057 (1986); *Pattern Makers League of North America v. NLRB*, 105 S.Ct. 3064 (1985); *Allis-Chalmers Corp. v. Lueck*, 105 S.Ct. 1904 (1985); *Trans World Airlines v. Thurston*, 469 U.S. 111 (1985); *New York Telephone Co. v. New York State Department of Labor*, 440 U.S. 519 (1979); *Buffalo Forge Co. v. United Steelworkers of America*, 428 U.S. 397 (1976); *Connell Construction Co. v. Plumbers and Steamfitters Local Union No. 100*, 421 U.S. 616 (1975).

²Pursuant to Rule 36.2 of the Rules of the Supreme Court of the United States, the parties have consented to the Chamber's *Amicus Curiae* participation in this appeal. Their letters of consent are filed with this Brief.

federal labor scheme and protected rights declared in the National Labor Relations Act (NLRA).

These issues are of vital concern to the Chamber's members. Many members operate businesses in Maine and are directly affected by the Severance Pay Law. Moreover, the potential impact of the Severance Pay Law extends beyond Maine's borders. Because this Court's decision will significantly affect state and federal law in the areas of employee benefits and labor relations, the Chamber submits this brief to assist the Court in resolving this case.

Statement of the Case

Fort Halifax Packing Company, Inc. (Halifax), a wholly-owned subsidiary of Corbett Enterprises, Inc., operated a poultry processing and packaging plant in Winslow, Maine. (App. 22). On May 23, 1981, Halifax ceased operations and laid off more than 100 employees. At the time of the closing, many Halifax employees were represented by Local 385 of the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO. The existing collective bargaining agreement between Halifax and Local 385, effective June 2, 1979 to June 2, 1982, had no provision for severance pay. There was no contract or agreement covering severance pay between Halifax and its supervisory employees. (App. 2-3).

In September, 1981, Halifax officials believed that reopening the plant was possible. Accordingly, Halifax and Local 385 negotiated amendments to the collective bargaining agreement providing that Halifax would have no severance pay liability under the Maine Severance Pay Law if operations resumed. The plant did not reopen. (App. 3).

Halifax did not pay severance under the Maine Severance Pay Law. On October 30, 1981, eleven employees filed suit against Halifax in Kennebec County Superior Court seeking severance pay pursuant to Section 625-B(4) of the Maine

Severance Pay Law. The Director of the Maine Bureau of Labor Standards also commenced an enforcement action in Superior Court on behalf of all Halifax employees. (App. 3-4). The trial justice found Halifax liable for severance pay. (App. 42-43). Halifax appealed the decision to the Maine Supreme Judicial Court, urging, *inter alia*, that the Severance Pay Law was preempted by ERISA and the NLRA. The Chamber participated as *Amicus*.

On June 6, 1986, the Supreme Judicial Court issued a decision modifying the trial justice's calculation of severance pay to ten employees and affirming the judgment of the Superior Court in all other respects. (App. 1-20).

Summary of Argument

Through ERISA and the NLRA, Congress has sought to assure both the protection of employee benefits promised by employers and the ability of employees voluntarily to organize and negotiate for such benefits. The Chamber believes that affirmation of the decision of the Maine Supreme Judicial Court in this case would not only be contrary to this Court's prior decisions concerning the preemptive sweep of ERISA and the NLRA, but would nullify Congress' efforts to achieve uniform federal policy in the areas of employee benefits and collective bargaining. Disruption of the nation's well-established labor policies would place a costly burden on the nation's employers, to the ultimate detriment of employees. The Chamber urges that the Maine Severance Pay Law be held preempted on the bases summarized below.

A. ERISA Preemption.

Under the plain language of ERISA, as well as the decisions of this Court, it is settled that a state may not pass a law which relates to, that is, has a connection with or reference to, a severance pay plan. The Severance Pay Law does far more than relate to a severance pay plan. It directly regulates such plans

by (1) nullifying plans which are neither express nor created by contract, but are nevertheless ERISA plans, and (2) in the absence of an express contract, establishing the state's own plan under ERISA, specifying the amount of severance pay, the class of beneficiaries and the procedures for distribution. Contrary to Appellee's position, the Severance Pay Law is not within ERISA's exception for unemployment compensation insurance laws, since the Severance Pay Law has no relationship to that well-recognized system. Instead, the Severance Pay Law is precisely the kind of regulation which, unless invalidated by this Court, will permit a state to require an employer to have any kind of benefit plan the state chooses, undoing the uniform and consistent regulation of employee welfare benefits which was the core of Congress' intent in enacting ERISA.

B. NLRA Preemption.

The Maine Severance Pay Law affects and was intended to affect the balance of power in collective bargaining. It provides employees a benefit to use as a bargaining chip in negotiations and precludes an employer from exercising certain protected rights. Accordingly, the Severance Pay Law is preempted by both doctrines of federal labor law preemption developed by this Court.

First, the Severance Pay Law affects the collective bargaining process by tipping the balance of power because it imposes economic consequences on the employer, but not on employees, if no express contract for severance pay results from negotiations. The effect of the Severance Pay Law is to force on the employer an express contract on a mandatory subject of bargaining, even though such an agreement cannot be compelled, and can be resisted absolutely, under the NLRA. The Severance Pay Law is not protected by *Metropolitan Life Insurance Co. v. Massachusetts*, 105 S. Ct. 2380 (1985). Unlike the Massachusetts insurance regulation at issue in *Metropolitan*, the Severance Pay Law gives the employer no choice: the employer must expressly con-

tract for the benefit or face the mandatory state payment. The Severance Pay Law does not establish a minimum standard for benefits and is not the kind of regulation tolerated by Congress as part of the historical context of the NLRA.

Secondly, the Severance Pay Law eviscerates the employer's protected right and economic weapon of implementing after *bona fide* impasse its last, best offer on severance pay. The Severance Pay Law also thrusts the state court into the determination of an employer's obligation to its unionized employees in the context of a plant closing, an area exclusively and extensively regulated by the National Labor Relations Board (NLRB), or alternatively into the area preempted by Section 301 of the Labor Management Relations Act. By attempting to impose a different and conflicting remedy than does the NLRA for an employer's refusal to contract for severance pay, the Severance Pay Law interferes directly with the scheme chosen by Congress for regulating labor management relations.

The Court should hold preempted the Maine Severance Pay Law to effectuate the letter and intent of ERISA and the NLRA. Maine and other states will remain free to remedy the economic and social disruption of business terminations by any method which does not eviscerate federal law.

ARGUMENT

I. The Maine Severance Pay Law Is Preempted By The Employee Retirement Income Security Act.

A. Severance Pay is a Welfare Benefit Covered by ERISA.

In the wake of this Court's decisions in *Holland v. Burlington Industries, Inc.*, 772 F.2d 1140 (4th Cir. 1985), *aff'd mem. sub nom. Brooks v. Burlington Industries, Inc.*, 106 S.Ct. 3267 (1986) and *Gilbert v. Burlington Industries, Inc.*, 765 F.2d 320 (2d Cir. 1985), *aff'd mem.*, 106 S.Ct. 3267 (1986), it is

settled that severance pay is a welfare benefit under ERISA, and any plan, fund, or program providing for severance pay is an ERISA-covered plan. Two separate rationales compel this conclusion. On the one hand, severance pay assists employees during the unemployment that follows job termination and as such is a "benefit[] in the event of . . . unemployment" within the definition of employee welfare benefit plan in Section 3(1)(A) of ERISA, 29 U.S.C. §1002(1)(A). *Holland*, 772 F.2d at 1145.³ So too, severance pay falls within the ambit of Section 3(1)(B), 29 U.S.C. §1002(1)(B), which incorporates by reference the "pooled vacation, holiday, severance or similar benefits" described in Section 302(c) of the Labor Management Relations Act, 29 U.S.C. §186(c) (emphasis added). *Id.*⁴ Thus, under the ordinary meaning of the language of the statute, as well as unanimous case law, it is indisputable that a severance pay plan is an employee welfare benefit plan governed by ERISA. Confronted with this unassailable proposition, Appellee argues that the Maine Severance Pay Law is saved from ERISA preemption because it does not "relate to" an ERISA-covered welfare benefit plan, or, if it does, it is saved from preemption by the exception in ERISA for unemployment compensation insurance laws. These arguments are unsupportable.

³*Accord* *Gilbert*, 765 F.2d at 325; *Jung v. FMC Corp.*, 755 F.2d 708, 710 n.2 (9th Cir. 1985); *Sly v. P.R. Mallory & Co.*, 712 F.2d 1209, 1211 (7th Cir. 1983); *Petrella v. NL Industries, Inc.*, 529 F.Supp. 1357, 1361 (D.N.J. 1982) ("Severance pay, which in general is intended to tide an employee over while seeking a new job, certainly could be considered an 'unemployment' benefit.").

⁴*Accord* *Blakeman v. Mead Containers*, 779 F.2d 1146, 1149 (6th Cir. 1985); *Gilbert*, 765 F.2d at 325; *Scott v. Gulf Oil Corp.*, 754 F.2d 1499, 1502 (9th Cir. 1985); *Sly*, 712 F.2d at 1210-11; *Donovan v. Dillingham*, 688 F.2d 1367 (11th Cir. 1982) (*en banc*); *Dependahl v. Falstaff Brewing Corp.*, 491 F.Supp. 1188, 1196 (E.D. Mo. 1980), *aff'd in relevant part*, 653 F.2d 1208 (8th Cir.), *cert. denied*, 454 U.S. 968 (1981).

B. The Maine Severance Pay Law "Relates to" an ERISA-covered Employee Welfare Benefit Plan.

Section 514(a) of ERISA, 29 U.S.C. §1144(a), provides that ERISA preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA. Indeed, this Court has held that "[t]he preemption provision was intended to displace all state laws that fall within its sphere, even including state laws that are consistent with ERISA's substantive requirements." *Metropolitan Life Insurance Co. v. Massachusetts*, 105 S.Ct. at 2389. In defining ERISA's preemptive sphere, this Court has given the statute a broad reading: "A law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983).

Ignoring the broad construction that must be given ERISA's preemptive sweep, Appellee's entire defense of the Maine Severance Pay Law rests on the narrow argument that since Fort Halifax did not maintain a severance pay plan, the Maine Severance Pay Law could not relate to such a plan. This facile approach is wrong. It ignores that the Maine Severance Pay Law not only "relates to" but in fact establishes an ERISA-covered plan. Moreover, the conflict with ERISA is direct because any number of ERISA-covered plans maintained by employers would not be recognized by the Maine Severance Pay Law.

1. The Maine Severance Pay Law Establishes an ERISA-Covered Plan.

By mandating that a covered employer have an "express contract" providing for severance pay, 26 M.R.S.A. § 625-B(3)(B) the Maine Severance Pay Law could not have a more direct "connection with or reference to" an ERISA-covered severance pay plan. The question of when severance pay benefits constitute an ERISA-covered plan was carefully considered in

Donovan, 688 F.2d 1367, wherein the Eleventh Circuit, sitting *en banc*, formulated a persuasive test: "[A] 'plan, fund or program' under ERISA is established if from the surrounding circumstances a reasonable person can ascertain the intended benefits, a class of beneficiaries, the source of financing, and procedures for receiving benefits." *Donovan*, 688 F.2d at 1373.⁵ In the case of the Maine Severance Pay Law, the intended benefits are severance pay at the rate of one week's pay for each year of employment, 26 M.R.S.A. §625-B(2); the class of beneficiaries are employees of three years or more, 26 M.R.S.A. §625-B(3)(D); the source of financing is simply the employer's general assets;⁶ and the procedure for receiving benefits is provided, including in the event of non-payment, suits by employees, 26 M.R.S.A. §625-B(4), or enforcement suits by the Director of the Maine Bureau of Labor, 26 M.R.S.A. §625-B(5).

Just as clear is the fact that such a state-mandated plan is impermissible. *Standard Oil Co. of California v. Agsalud*, 633 F.2d 760 (9th Cir. 1980), *aff'd mem.*, 454 U.S. 801 (1981), establishes that a state may not mandate creation of an ERISA welfare benefit plan.⁷ As the court in *Agsalud* recognized, re-

⁵*Accord Scott*, 754 F.2d at 1503-04; *Molyneux v. Arthur Guinness & Sons*, 616 F.Supp. 240, 243 (S.D.N.Y. 1985); *Blue Cross & Blue Shield of Alabama v. Peacock's Apothecary, Inc.*, 567 F.Supp. 1258, 1267 (N.D. Ala. 1983).

⁶Any argument that the State-imposed severance pay plan would not be covered by ERISA because it is not specifically funded has been finally laid to rest. *See Holland*, 772 F.2d at 1145 ("We also reject the Commissioner's contention that Burlington's severance pay plan is not within ERISA because it is not specially funded."); *accord Gilbert*, 765 F.2d at 325-26 (unfunded severance pay policy included within ERISA's definition of employee welfare benefit plan); *Scott*, 754 F.2d at 1502 (Department of Labor regulation promulgated under ERISA "does not limit the definition to those severance benefits which are pooled or which are funded by a trust fund.").

⁷*Accord Stone & Webster Engineering Corp. v. Isley*, 690 F.2d 323 (2d Cir. 1982), *aff'd sub nom. Arcudi v. Stone & Webster Engineering*, 463 U.S. 1220 (1983).

quiring an employer to have an ERISA-covered plan or to be subject to Maine's own welfare benefit plan is "relating to" an existing welfare benefit plan. If not, any employer without an ERISA-covered plan of whatever kind—be it a pension plan, a health plan, an accident plan, or a severance pay plan—could be required by any state to have such a plan or to pay a state-mandated amount.⁸ As this Court has repeatedly stated, "In deciding whether a federal law preempts a state statute, our task is to ascertain Congress' intent in enacting the federal statute at issue." *Metropolitan*, 105 S.Ct. at 2388. If Congress had intended to permit a state-mandated pension or welfare benefit

⁸Two fatal infirmities are brought to light by that scenario. First, as noted in *Holland*, *supra*, ERISA's broad preemption of state laws furthers a major policy objective: uniformity in employee benefit laws. According to the Court in *Holland*, Congress realized that myriad state regulations of employee benefit plans had become a major concern to employers with plants, divisions, or employees scattered in numerous states, and a broad preemption provision was an integral part of ERISA's response. *Holland*, 772 F.2d at 1147, citing *Shaw*, 463 U.S. at 99.

Any hope of uniformity in employer obligations would be lost were we to allow various states' common law governing these obligations to coexist with federal common law under ERISA. Under such a scheme, employers would not only be faced with dual requirements within a single state, but with different state requirements wherever they do business. ERISA surely contemplates a different result.

Holland, 772 F.2d at 1147 n.5.

In addition, as this Court has observed, ERISA does not mandate that employers provide any particular benefit. *Shaw*, 463 U.S. at 91; *see also Blau v. Del Monte Corp.*, 748 F.2d 1348, 1353 (9th Cir. 1985), *cert. denied*, 106 S.Ct. 183 (1986) ("ERISA mandates no minimum substantive content for employee welfare benefit plans."); *Sutton v. Weirton Steel*, 567 F.Supp. 1184, 1195 (N.D.W. Va.), *aff'd*, 724 F.2d 406 (4th Cir. 1983), *cert. denied*, 467 U.S. 1205 (1984) ("ERISA does not require an employer to offer any type of benefit."). The Maine Severance Pay Law then clashes head-on with ERISA's policy of not requiring employers to establish any particular welfare benefit plan.

plan, where the affected employer did not have such a plan, Congress could certainly have done so. The omission from the specific exceptions to ERISA's broad preemptive language of the exception asserted by Appellee is further proof of Congress' clearly stated intent to assure uniformity of pension and welfare benefit plan treatment.⁹

2. The Maine Severance Pay Law Conflicts Directly with ERISA.

Quite contrary to Appellee's suggestion that the parties do "not argue that there is any conflict between ERISA and the Maine Severance Pay Law," Motion to Dismiss or Affirm at 5, the conflict between the two laws is glaring. Just two of many possible scenarios make this clear. The first example is the Burlington severance pay plan recognized by this Court in *Holland* and *Gilbert* as covered by ERISA. Not only would such plans be invalid in Maine under the Severance Pay Law, they would be replaced by the severance pay plan contained in the Maine Severance Pay Law.

In both *Holland* and *Gilbert*, the severance pay provision of Burlington Industries was set forth only in its Policy Manual and its Salaried Employee Handbook. The Burlington program provided for disqualification for narrow reasons, the determination of which was left to the company's discretion as long as it did not act arbitrarily or capriciously. Crucially, in each case the Circuit Court recognized that a unilateral statement of intent to pay severance pay, with no trustee, trust fund or filing with the Department of Labor, constitutes an ERISA-covered plan. *Holland*, 772 F.2d at 1144-1145; *Gilbert*, 765 F.2d at 324-326. Since the Maine Severance Pay Law exempts from its requirements only those severance pay arrangements which are

⁹As Representative Dent, one of ERISA's sponsors, noted: "With the preemption of the field, we round out the protection afforded participants by eliminating the threat of conflicting and inconsistent state and local regulation." 120 Cong. Rec. 29197 (1974).

created by an "express contract," 26 M.R.S.A. §625-B(3)(B), Burlington's ERISA-covered plan would *not* be recognized. Under the Maine Supreme Judicial Court's decision below, Burlington would be required to comply with the Severance Pay Law.

As the Burlington example illustrates, the effect of the Maine Severance Pay Law is to invalidate or supplement a plan which is within the scope of ERISA. No law can have a more direct "reference or connection" with an ERISA-covered benefit plan than the Maine Severance Pay Law. The Maine Supreme Judicial Court's conclusion to the contrary is in direct conflict with this Court's decisions. Indeed at footnote 9 of its opinion (App. 9), the Maine Supreme Judicial Court implicitly acknowledges the conflict, underscoring the need for this Court to state that the Maine Severance Pay Law does relate to ERISA benefit plans and is preempted.¹⁰

While the Burlington example alone eliminates the plausibility of arguing that the Severance Pay Law does not relate to ERISA-

¹⁰A long line of cases follows *Holland* and *Gilbert* and stands uniformly for the proposition that a voluntary, unilateral declaration of severance pay benefits by an employer, with no employee participation in the development of the plan, much less an "express contract" for such benefits with the employees, constitutes an employee welfare benefit plan which is covered by ERISA. See *Barry v. Dymo Graphics Systems, Inc.*, 478 N.E. 2d 707 (Mass. 1985) (voluntary obligation in personnel policies); *Blau*, 748 F.2d at 1352 (voluntary undisclosed plan); *Donovan*, 688 F.2d at 1372 (no formal, written plan required); *Jung*, 755 F.2d at 709 (voluntary unilateral plan for salaried personnel); *Petrella*, 529 F.Supp. at 1362 (severance pay by tradition, not even disclosed in writing to employees, and purely discretionary); *Sly*, 712 F.2d at 1210 (unilateral policy statement); *Dependahl*, 491 F.Supp. at 1190 (unilateral severance pay policy in policy manual); *Pinto v. Zenith Radio Corp.*, 480 F. Supp. 361, 362 (N.D. Ill. 1979) (unilateral corporate statement); *Donnelly v. Aetna Life Insurance Co.*, 465 F. Supp. 696 (E.D. Pa. 1979) (unilateral statement in personnel manual that plaintiffs never saw). None of these ERISA-covered plans involved an "express contract." Accordingly, none would mitigate the mandatory pay-out in the Severance Pay Law, and the State's mandated amount would replace such ERISA-covered plans.

covered welfare benefit plans, a second scenario renders Appellee's argument indefensible. The example hypothesizes an employer subject to the Severance Pay Law, who voluntarily elects to create a severance pay plan, files it with the U.S. Department of Labor, establishes a claims procedure, describes the plan in its handbook and distributes a summary plan description to covered employees, all in compliance with ERSIA regulations. Even that ERISA-covered plan is invalidated by Maine's Severance Pay Law, because there is not the "express contract" required by the Severance Pay Law.

In an attempt to avoid this direct conflict between ERISA and the Severance Pay Law, Appellee may suggest that unilateral employer action satisfies the requirement of an express contract. Appellee then would be conceding that whatever amount of severance pay, including zero, an employer wished to declare would exempt the employer from the mandatory pay provision of the Maine Severance Pay Law. Heretofore Appellee consistently has refused to take that position. Indeed, the language of the Severance Pay Law requiring "an express contract providing for severance pay" cannot logically be read to encompass that position. If an employer could unilaterally create, amend, or reduce to zero its severance pay plan, the Severance Pay Law would be meaningless. Appellee's dilemma of course is that only this reading of the Severance Pay Law avoids a direct conflict with ERISA's preemption provisions.¹¹

¹¹Similarly, Appellee's suggestion in its Motion to Dismiss, at 8 n.5, that the parties could "contract" to eliminate severance pay benefits is meaningless. Employees could simply refuse to agree to no severance pay, or to any amount less than that provided by the Maine Severance Pay Law, and have the state-mandated amount apply automatically. Additionally, a contract for no severance pay is contrary to the fundamental intent of the Severance Pay Law to "alleviate the adverse economic impact upon the employees and the community in which they live". Statement of Fact, Maine Revised Statutes, Chapter 452 (1971).

In sum, the Maine Severance Pay Law renders ERISA's preemption provisions invalid and its goal of uniformity of regulation meaningless. This outcome is in direct conflict with Congressional intent and with this Court's repeated holdings on the effect of ERISA preemption.

C. The Maine Severance Pay Law Is Not An "Unemployment Compensation" Law Excepted by 29 U.S.C. §1003(b)(3).

This Court has previously noted that "[t]he only relevant state laws, or portions thereof, that survive [ERISA's] preemption provision are those relating to plans that are themselves exempted from ERISA's scope." *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 n.20 (1981). Section 4 of ERISA provides in part that ERISA "shall not apply to any employee benefit plan if . . . such plan is maintained solely for the purpose of complying with applicable . . . unemployment compensation . . . insurance laws. . . ." 29 U.S.C. §1003(b)(3). Appellee suggests that Section 4 can be construed as a saving clause permitting the Maine Severance Pay Law. Motion to Dismiss or Affirm at 12 n. 8. In doing so, Appellee ignores the settled meaning of the phrase "unemployment compensation insurance law."

Since 1935, Sections 301 through 303 of the Social Security Act, 42 U.S.C. §§ 501-503, have provided a distinct statutory scheme "for the purpose of assisting the States in the administration of their *unemployment compensation laws*. . . ." 42 U.S.C. §501 (emphasis added). Pursuant to this federal scheme, Maine has enacted its own detailed laws governing unemployment compensation. *See* 26 M.R.S.A. §1041 *et seq.* Under such laws, employers in Maine are required to pay into a state-maintained fund, from which benefits are paid, with employer assessments for additional or increased payments to the fund based upon the employer's individual unemployment experience rating, precisely in the form of an insurance fund. The Maine Severance Pay Law plays no role in Maine's detailed

unemployment compensation insurance laws. When Congress listed plans required solely to comply with state unemployment compensation insurance laws as an exception to the broad preemption of ERISA, Congress was clearly aware of the well-established body of state unemployment compensation insurance laws then existing, and the interrelationship between such laws and related federal laws such as the Social Security Act and the Internal Revenue Code.

Indeed, the conclusion that the unemployment compensation insurance laws excepted from ERISA in 29 U.S.C. §1003(b)(3) must be narrowly defined is supported in ERISA itself.¹² The statutory section immediately preceding 29 U.S.C. §1003 provides that: "The term[] 'employee welfare benefit plan' mean[s] any plan, fund, or program . . . established or maintained . . . for the purpose of providing . . . (A) . . . benefits in the event of . . . unemployment. . . ." 29 U.S.C. §1002(1) (emphasis added). If, as Appellee suggests, the unemployment compensation exception in ERISA governs any termination of employment, the provision of 29 U.S.C. §1002(1)(A), which provides that plans established to provide benefits for unemployment are ERISA-covered employee welfare benefit plans, is vitiated. In addition, Appellee's assertion is directly rejected by the unanimous line of cases, cited at footnote 3 above, which holds that precisely because severance pay is a benefit in the event of unemployment, severance pay is an employee welfare benefit plan covered by ERISA.

If Appellee's definition of unemployment compensation insurance were adopted, the 29 U.S.C. §1003(b)(3) exception to ERISA preemption would swallow the rule. The tautology—that severance pay lessens the hardship of unemployment and therefore severance pay is "unemployment compensation"—is

¹²This Court has previously underscored the "narrow exceptions" carved out by Congress in ERISA. *Shaw*, 463 U.S. at 105. See also 120 Cong. Rec. 29197, 29933.

overbroad. Without the clearly stated intent of Congress, indeed contrary to Congress' stated intentions to cover benefits for unemployment, there is no basis to alter the ordinary meaning of unemployment compensation insurance laws. By departing from the customary meaning of unemployment compensation, Appellee's argument leads to the conclusion that since retirement benefits lessen the hardship of an end to employment, pension benefits also constitute unemployment compensation. Taken to its logical extension, it would allow any state total freedom in mandating any benefit, including pensions. This flies in the face of the purpose of ERISA and should be rejected.

II. The Maine Severance Pay Law Is Preempted By The National Labor Relations Act.

A. Overview of NLRA Preemption.

In drawing the boundaries of federal labor law preemption, this Court has developed two distinct branches of analysis. The so-called free play branch, articulated in *Lodge 76, International Association of Machinists and Aerospace Workers v. Wisconsin Employment Relations Commissions*, 427 U.S. 132 (1976), precludes state regulation of areas which intentionally have been left by Congress "to be controlled by the free play of economic forces" between employers and employee organizations. *Machinists*, 427 U.S. at 140, quoting *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144 (1971). In recent years the Court has entertained a steady flow of cases raising "free play" preemption claims. The Court's expression of the free play doctrine has varied somewhat depending on the facts at bar, the clarity of Congressional intent to allow state regulation on the issue, and the unanimity of the Justices. Nevertheless, the litmus test for "free play" preemption has remained constant. If a state or local regulation tips the balance of bargaining power toward one side or the other to a degree not countenanced by Congress,

it is preempted. *Machinists*, 427 U.S. at 153; *Teamsters Local 20 v. Morton*, 377 U.S. 252 (1964); *New York Telephone Co. v. New York State Department of Labor*, 440 U.S. 519; *Metropolitan Life Insurance Company v. Massachusetts*, 105 S.Ct. 2380; *Golden State Transit Corporation v. City of Los Angeles*, 106 S.Ct. 1395 (1986); *Wisconsin Department of Industry v. Gould*, 106 S.Ct. 1057. See also Cox, *Recent Developments in Federal Labor Law Preemption*, 41 Ohio State L.J. 277, 292, 294-95 (1980). This test controls regardless of the form of regulation (state labor board injunction, *Machinists*, 427 U.S. 132; exercise of a traditional local function, *Golden State Transit Corporation v. City of Los Angeles*, 106 S.Ct. 1395; state court judgment, *Teamsters v. Morton*, 377 U.S. 252; state legislation, *New York Telephone v. New York State Department of Labor*, 440 U.S. 519; state's spending decisions, *Wisconsin Department of Industry v. Gould, Inc.*, 106 S.Ct. 1057) or whether the regulation is one which applies to the general public or operates specifically on employers, employees and unions.

Under the second preemption doctrine, the states must yield exclusive jurisdiction to the NLRB whenever the conduct that the state seeks to regulate is subject to NLRB jurisdiction and is protected, prohibited or arguably protected or prohibited by the NLRA. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). The Garmon doctrine "is intended to preclude state interference with the NLRB's interpretation and active enforcement of the integrated scheme of regulation established by the NLRA." *Golden State Transit Corporation v. City of Los Angeles*, 106 S.Ct. at 1398, quoting *Wisconsin Department of Industry v. Gould*, 106 S.Ct. at 1062.

B. The Maine Severance Pay Law Is Preempted Under the "Free Play" Doctrine.

1. The Severance Pay Law Impermissibly Intrudes Into the Bargaining Process.

The process of collective bargaining is the primary concern of the NLRA. *Metropolitan*, 105 S.Ct. at 2395, 2396. See also *New York Telephone Company v. New York State Department of Labor*, 440 U.S. at 551 (Powell, J., dissenting). As envisioned by Congress, bargaining must occur in an atmosphere of equality. *Metropolitan*, 105 S.Ct. at 2395; *Golden State Transit Corporation v. City of Los Angeles*, 106 S.Ct. at 1400. A state cannot "add to an employer's federal legal obligations in collective bargaining" any more than in the case of employees." *Machinists*, 427 U.S. at 147.

The Maine Severance Pay Law prevents the process of collective bargaining from operating with the balance and equality decreed by Congress. Severance pay is a mandatory subject of bargaining. See *NLRB v. Royal Plating & Polishing Co.*, 350 F.2d 191, 196 (3d Cir. 1965); *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 678, n.15 (1981). Indeed, in negotiations triggered by an employer's decision to terminate or relocate its operation, severance pay is often the crucial issue. The union typically proposes a high amount of severance; the employer counters with a lower amount or even zero. In the framework of unfettered collective bargaining under the NLRA, each party is then free to wrest concessions in exchange for its agreement to the other's proposal, to insist on its own proposal, or to refuse to agree at all. In the absence of intrusive state regulation, bargaining proceeds as Congress intended: between parties who are equally positioned, are under no compulsion to agree to the other's demands, and are free to use the full panoply of economic weapons at their disposal to achieve voluntary agreement. *Golden State Transit Corporation v. City of Los Angeles*, 106 S.Ct. at 1400; *First National Maintenance Corp. v. NLRB*, 452 U.S. at 670.

An employer subject to the Maine Severance Pay Law has no equality of bargaining position. The employer comes to the bargaining table needing an express agreement on severance pay to escape the substantial payment otherwise required by the Severance Pay Law. The union has no incentive to enter into such an agreement or to make concessions to achieve its own position on severance pay, since in the absence of an express agreement, severance liability will nevertheless be imposed on the employer. The Severance Pay Law gives the union a bargaining chip which inevitably tilts negotiations on severance pay in favor of the union. The effect is to undo the Congressional decision to send the parties to the bargaining table with equivalent power.

In levying economic consequences on the employer for failing to achieve an express contract, the State is attempting both to aid the party which the State judges to be the weaker and to impose its own solution to the parties' bargaining stand-off. This Court has consistently held that state action which has this effect is preempted. "Even though agreement is sometimes impossible, the government may not step in and become a party to the negotiations." *Golden State Transit*, 106 S.Ct. at 1401. Not even the NLRB, with its broad remedial authority, can compel either party to reach agreement on a mandatory subject or burden one side more than the other for the failure to agree after good faith bargaining. *H.K. Porter and Co. v. NLRB*, 397 U.S. 99 (1970). Maine may not attempt to achieve the same result.

2. The Severance Pay Law Deprives the Employer From Resorting to the Legitimate Weapon of Unilaterally Implementing Its Last, Best Offer on Severance Pay.

In addition to tipping the balance of power in actual negotiations, the Severance Pay Law interferes with the employer's ability to further its bargaining position by implementing unilaterally its last, best offer after a bargaining impasse has been reached. Unilateral implementation is a legitimate economic

weapon under the NLRA, just as is a strike or lock-out. *NLRB v. Katz*, 369 U.S. 736 (1962); *Reed & Prince Mfg. Co. v. NLRB*, 205 F.2d 131 (1st Cir.), *cert. denied*, 346 U.S. 887 (1953). The State may not impede its use any more than it could prohibit peaceful recognitional picketing, *Garner v. Teamsters Union*, 346 U.S. 485 (1953), a secondary boycott, *Teamsters v. Morton*, 337 U.S. 252, or a concerted refusal to work overtime, *Machinists*, 427 U.S. 132. Nor may the State restrict an employer's weapons more than a union's. *Golden State Transit*, 106 S.Ct. at 1401.

Applying the employer's protected right of unilateral implementation to the facts at issue here, an employer whose last bargaining offer is for zero severance pay could, at impasse and in the absence of an express contract, implement its no severance pay offer. Like other employer self-help measures, the economic pressure generated by unilateral implementation would be an incentive to the union to return to the bargaining table, to curtail its own economic weapons, or to make other concessions.

Yet a Maine employer subject to the Severance Pay Law can wield no economic pressure by unilateral implementation of its severance pay offer. Without an express contract, the employer is subject to severance pay liability. The Severance Pay Law effectively eliminates this federally-sanctioned weapon from the employer's economic arsenal.¹³ Under this Court's consistent decisions protecting the free use of economic weapons by either

¹³Appellant interprets the Severance Pay Law to permit an employer to establish an express contract for severance pay by unilateral declaration. Jurisdictional Statement at 12. If this view is correct, the Severance Pay Law encourages collective bargaining and operates unequally on unionized and non-unionized employees. A unionized employer may not act unilaterally under the NLRA; a non-unionized employer would have no constraint. A state law that encourages collective bargaining, or that penalizes an employee's right to refrain from union activities, is invalid. *Metropolitan Life Insurance Company v. Massachusetts*, 105 S.Ct. at 2398.

party to enhance its bargaining position, and rejecting state attempts to limit those economic weapons, the Maine Severance Pay Law is preempted.

C. The Maine Severance Pay Law is Not Protected under *Metropolitan Life Insurance Company v. Massachusetts*.

Metropolitan Life Insurance Company v. Massachusetts, 105 S.Ct. 2380, does not control this case, except as it affirms that equality of bargaining power is the centerpiece of the NLRA.

The issue in *Metropolitan* was a narrow one: whether a state insurance regulation that does not alter the balance of bargaining is the kind of interference with the goals of federal labor law which is forbidden by the NLRA. The dispositive difference between *Metropolitan* and this case is that the Severance Pay Law indisputably tips the balance of bargaining. Unlike the Massachusetts statute, which leaves the parties free to purchase the benefit or not, *Metropolitan*, 105 S.Ct. at 2394, the Severance Pay Law gives the employer no choice. The failure to negotiate an express contract for severance pay subjects the employer to payment by law. By compelling agreement on a critical bargaining term, Maine has acted more like Los Angeles in *Golden State Transit*, 106 S.Ct. 1395, than like Massachusetts in *Metropolitan*.

In further distinction from the regulation at issue in *Metropolitan*, the Severance Pay Law does not mandate any minimum benefit. The Severance Pay Law applies only to large employers and to certain categories of employees. It permits a covered employer to make any severance pay contract whatsoever with covered employees or their bargaining representatives, arguably even for zero severance benefits. Indeed, the Severance Pay Law does not require uniform or minimum severance benefits even among covered employees in the same establishment.

Rather than setting a "specific minimum protection" for individual workers, *Metropolitan*, 105 S.Ct. at 2397, quoting *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 739 (1981), the Severance Pay Law attempts to set the method by which covered employers and employees reach accommodation on the issue of severance pay during a plant closing. The method which the State favors—an express contract between employers and employees—is incompatible with the process of free collective bargaining chosen by Congress to accommodate the parties' interests on the same subject. The Severance Pay Law affects not only the result but the very process of bargaining, which this Court affirmed in *Metropolitan* is the foundation of federal labor law.

The Severance Pay Law is not one of the historical areas of state regulation which Congress intended to tolerate when it enacted the NLRA. Nor is it a law of general applicability. *cf. Metropolitan*, 105 S.Ct. at 2395-2396. *See also New York Telephone Company v. New York State Department of Labor*, 440 U.S. 519, 564. The Severance Pay Law operates directly on employers and employees rather than on the broader public. Indeed, adjustment of the relative strength between labor and management was the purpose of the Severance Pay Law. In legislative debates leading to initial enactment in 1971,¹⁴ State Representative Bustin of the Labor Committee stated:

It is often said that labor has no rights unless they are negotiated at the bargaining table or unless they are legislated. And this is a right that should be legislated; a right that workers should have. . . .

Legislative Record, Maine House of Representatives, 105th Maine Legislature, June 10, 1971, p. 3864.

¹⁴The original version of the Severance Pay Law required notice of a plant closing but did not mandate pay in the absence of an express contract. Maine Revised Statutes, Chapter 452 (1971).

Finally, the Severance Pay Law is not a valid use of the State's police power. *Cf. Metropolitan*, 105 S.Ct at 2398. Whatever the limits of the police power, this Court has never held that it permits state regulation which interferes with the operation and purpose of federal labor law. In fact, as the Court has recently reiterated, even the exercise of a quintessential local function is held preempted when it intrudes into the collective bargaining process. *Golden State Transit*, 106 S.Ct. 1395.

Appellee and the Maine Supreme Judicial Court apparently construe *Metropolitan* as protecting from preemption any state law of general application which equally affects union and non-union employees alike, regardless of its impact on labor relations. The logical extension of that position is that the states are free to establish, piecemeal or through comprehensive labor codes, all facets of wages, hours, terms and conditions of employment. Were this the case, the process of collective bargaining would be reduced to mere form, and employee self-organization would be discouraged. *Metropolitan*, which confirms that the bargaining process is the paramount concern of the NLRA, hardly stands for this proposition. Appellee's reliance at all on *Metropolitan* is misplaced, because the Severance Pay Law is crucially distinct from the Massachusetts insurance law. Further, Appellee's reading of *Metropolitan* is incorrect and inconsistent with the long line of free play preemption cases decided by the Court during the past fifty years.

D. In Preempting the Maine Severance Pay Law, The Court Can Provide Guidance and Clarification of the Principles of "Free Play" Preemption.

As is set out above, in applying free play preemption the Court has consistently struck down state regulation which upsets the balance of power in negotiations and in the unfettered use of legitimate economic weapons, and has only sustained state regulation where there is clear indication that Congress affirmatively intended to permit it. However, particu-

larly since the divided opinion in *New York Telephone*, the Court's rationale has differed somewhat in emphasis and expression from case to case. As one commentator has suggested, there is a continuing need for clarification and consistency in the "free play" area. Cox, *Recent Developments in Federal Labor Law Preemption*, 41 Ohio St. L.J. 227, 300. The detrimental result is that it has become difficult for state courts, legislatures and other regulatory bodies, as well as for labor and management, to predict in advance whether a regulation is susceptible to preemption. The Chamber respectfully urges the Court to clarify this complex area through the vehicle of this case. Specifically, the Chamber urges that in preempting the Maine Severance Pay Law, the Court confirm that the effect of state regulation, rather than its purpose or subject matter, is dispositive on preemption. The majority holding in *Golden State Transit* makes this point. However, in light of dictum in *Metropolitan* and Justice Steven's dissent in *New York Telephone* suggesting a presumption of validity for laws of general application, further clarification would be helpful. Additionally, the Chamber urges the Court to confirm that preemption follows whenever a state regulation affects the bargaining process, either by burdening one side's ability to negotiate freely and equally on mandatory subjects more than the other's or by restricting either party's use of a legitimate economic weapon. Finally, this case presents the opportunity for the Court to reiterate that a state's police power may not be invoked to regulate an area which is already regulated or deliberately left unregulated by federal labor law.

E. The Maine Severance Pay Law Regulates Conduct Which Is Protected by the NLRA And Within the Primary Jurisdiction of the NLRB.

An employer's obligations to employees in the event of a decision to close or relocate its operations are regulated by the NLRA. *See, e.g., Fibreboard Paper Products v. NLRB*, 379 U.S. 203 (1964); *First National Maintenance Corp v. NLRB*, 452 U.S. 666; *Otis Elevator Co.*, 269 N.L.R.B. 891 (1984).

Whether an employer is compelled to bargain in good faith over either the decision or the effects of the closing or both is controlled by the NLRA,¹⁵ and the employer may invoke certain rights protected under the NLRA as part of the bargaining process. As noted in Section (B)(2) above, the employer would have the right to refuse to agree to severance pay and to stand on its refusal. In the face of *bona fide* impasse, the employer would also have the right to implement its last, best bargaining offer on severance. The unilaterally implemented offer would become the "last word" on severance pay. The Severance Pay Law's interference with the actually or arguably protected rights of the employer invokes *Garmon* as well as "free play" preemption. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236.

In addition to interfering with rights protected by the NLRA, the Severance Pay Law interferes with the exclusive jurisdiction of the NLRB. The risk of overlapping proceedings and findings between the state court and the NLRB is particularly great if the parties have negotiated, failed to reach agreement on severance, and the employer has unilaterally implemented its last best offer. In this situation, the union is likely to challenge the employer's unilateral action by filing a refusal to bargain charge with the NLRB. Whether *bona fide* impasse has been reached is "often difficult for the bargainers and is necessarily so for the Board", raising fact issues "involving the Board's presumed expert experience and knowledge of Company problems." *Dallas General Drivers, Local 745 v. NLRB*, 355 F.2d 842, 844 (D.C. Cir. 1966). At the same time the State could proceed with enforcement of the Severance Pay Law. The existence and nature of the parties' agreement on severance pay would be the subject

¹⁵Under some circumstances, the employer would have no obligation to bargain either the decision or the effects. For example, the union may have waived the right to bargain any aspect of the closing, see, e.g., *Speidel Corp.*, 120 N.L.R.B. 733 (1958), or a collective bargaining agreement may specifically cover all aspects of the closing sufficiently to preclude any further bargaining obligation, see, e.g., *NLRB v. Jacobs Manufacturing Co.*, 196 F.2d 680 (2d Cir. 1952).

of both state enforcement proceedings and NLRB proceedings. Different and conflicting remedial schemes would apply. This is precisely what Congress was seeking to avoid when it established the NLRB to administer federal labor policy.¹⁶ *Garmon*, 359 U.S. at 247.

None of the narrow exceptions to *Garmon* applies to the Severance Pay Law. *Garmon* preemption will not follow when: (1) the conduct at issue is neither protected nor arguably protected by the NLRA; (2) the state's interest is "overriding" and deeply rooted in local feeling and responsibility; and (3) the state action will not interfere with effective administration of national labor policy. *Farmer v. United Brotherhood of Carpenters*, 430 U.S. 290 (1977). In addition to being outside the exceptions because it regulates conduct which is protected or arguably protected and interferes with the jurisdiction of the NLRB, the Severance Pay Law is not rooted in a state interest which overrides the federal policy or is exceptionally local in nature. Although Maine undoubtedly has

¹⁶The Severance Pay Law not only interferes with the jurisdiction of the NLRB, but would likely enmesh the state court in interpreting and applying the existing collective bargaining agreement. Among the myriad issues which could arise are whether a contractual severance pay clause applies in the event of business termination and therefore constitutes an "express contract" in mitigation of the Severance Pay Law; which employees have been "employed" for three years, as that term is defined by the parties; whether the union had waived any claim to severance pay during negotiations; and what effect waiver would have on the right to claim statutory severance pay. Indeed, in this case the Maine Supreme Judicial Court determined whether the dispute was arbitrable. These issues are not to be determined in the context of state law. Instead, questions arising under a collective bargaining agreement must be determined exclusively by reference to federal law in actions brought either under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a), or under the grievance and arbitration procedure in the bargaining agreement. *Allis-Chalmers v. Lueck*, 105 S.Ct. 1904. "State-law rights and obligations that do not exist independently of private agreements, and that as a result can be waived or altered by agreement of private parties, are preempted by those agreements." *Id.*

an interest in accommodating the rights of employees and employers during a plant termination, that same accommodation has been made in the NLRA and cannot be regulated based on the State's generalized interest. The "local interest" exception so far has been applied only to controversies involving common law torts, where state law operates independent of labor relations issues. See, e.g., *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180 (1978) (trespassory picketing); *Farmer v. United Brotherhood of Carpenters*, 430 U.S. 290 (intentional infliction of emotional distress); *Belknap, Inc. v. Hale*, 463 U.S. 491 (1983) (injury to third parties by misrepresentations during a strike).

The Severance Pay Law invokes no exceptions. It must be preempted under *Garmon* and this Court's consistent protection of the primary jurisdiction of the NLRB to administer federal labor law.

III. The Maine Severance Pay Law Should Be Held Preempted By ERISA And The NLRA As A Matter Of National Industrial and Employment Relations Policy.

In 1986 eighteen state legislatures considered 38 separate bills concerning plant closings, relocations and reductions in force.¹⁷ Three of those bills would provide mandatory severance pay.¹⁸ Several of the bills would require continuation of health insurance plans at the employer's expense.¹⁹ The Massachusetts legislature is considering amending its voluntary plant closing "compact" to make notice and severance pay pro-

¹⁷"Clearinghouse," Vol. 2, No. 15, August/September 1986. National Center On Occupational Readjustment, Inc.

¹⁸Illinois, H. 2665 and H. 2924; Missouri, H. 1128 & S. 601; West Virginia, S. 323.

¹⁹Illinois, H. 2924; Massachusetts S. 92 and H. 2952; Pennsylvania H. 793; New York, A. 10523.

visions mandatory.²⁰ It is no exaggeration to predict that mass intrusion by the states into the federally-regulated arenas of welfare benefits and collective bargaining will be triggered by a signal that state regulation of those areas is permissible. Validation of the Maine Severance Pay Law would be that signal.

A recent survey by the United States Department of Labor documents the potential impact of state intrusion on severance pay plans alone. Forty-five percent of employers with fifty (50) or more employees in professional, administrative, technical, clerical, or production classifications have severance pay plans.²¹ If even some of those employers were compelled to have "express contracts" to be exempt from a statute such as Maine's Severance Pay Law, existing ERISA-covered plans for a significant number of employers and employees would be nullified. One more economic decision which employers traditionally have made on the basis of cost, benefits to be achieved and the competition within their industries will have been politicized and withdrawn from the business judgment arena.

If state-by-state regulation of welfare benefits were permitted, multi-state employers would have to cope with a plethora of severance pay and other welfare benefit requirements. One state law could exempt any employer with an express contract providing the benefit; another could exempt any company with a unilaterally adopted plan. Some states might tie the required benefit coverage to gross sales of the company, others to the gross wages paid by the company. Whatever the diverse requirements of state laws, a multi-state employer's ability to plan

²⁰Massachusetts, S. 92 and H. 2952 (1986).

²¹U.S. Dept. of Labor, Bureau of Labor Statistics, July 1986, Bulletin 2262. Another study by the American Society for Personnel Administration suggests an even higher percentage, with 84.6% of those responding to the survey having such plans. *Most Firms Have Severance Pay Programs*, Resource, October 1986, p. 2.

its cost of operations or to base business decisions on the resources and markets available in any given location would be greatly complicated. The "crowning achievement" of ERISA, "eliminating the threat of conflicting and inconsistent state and local regulations,"²² would also be gutted. The trade-off for many companies in accepting ERISA's stringent procedures and administrative safeguards, as well as the heavy cost of required funding, was the ability to plan according to one set of rules. With the loss of that ability many companies may eliminate or elect not to create pension welfare benefit plans.

It is reasonable and laudable that the states be concerned with the economic hardship that may result from plant closings. Indeed, many states currently have unemployment compensation insurance laws and training programs which aid displaced workers. The states' interest in plant closing protections, however, does not legitimize the establishment of state labor codes governing all aspects of the employment relationship. It would risk economic turmoil to permit states at this time to change wholesale the rules upon which employment relations have been planned and conducted. Multi-state companies, struggling both to recapitalize and to compete with well made and lower cost foreign products, simply cannot cope with the prospect of every state or local government establishing laws governing wages (including pension and welfare benefits), hours and conditions of employment.

In sum, Congress has declared our uniform and comprehensive national labor policy, and the nation's employers and employees have relied on those declarations. This Court should effectuate those policies and apply the well-established preemption principles of ERISA and NLRA in holding the Maine Severance Pay Law preempted.

²²Remarks of Sponsor Representative Dent, 120 Cong. Rec. 29197 (1974).

CONCLUSION

The judgment of the Supreme Judicial Court of Maine should be reversed.

Respectfully submitted,

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